



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 Church Street
L&C Annex 6th Floor
Nashville, TN 37243-1534

March 4, 2008

Matt McClain
1721 Gainesboro Grade
Cookeville, Tennessee 38501

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7006 0810 0000 1061 7221

Subject: DIRECTOR'S ORDER NO. WPC08-0032
CUMBY PLACE SUBDIVISION
PUTNAM COUNTY, TENNESSEE

Dear Mr. McClain:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Mark Jordan at (615) 532-0675.

Sincerely,

Patrick N. Parker, Manager
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Cookeville
DWPC – Compliance File
OGC

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

| | | |
|--------------------------------------------------|---|------------------------------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| MATT MCCLAIN D/B/A MCCLAIN EXCAVATING |) | DIVISION OF WATER POLLUTION CONTROL |
| |) | |
| RESPONDENT |) | CASE NUMBER WPC08-0032 |
| |) | |

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Tennessee Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

II.

Matt McClain, D/B/A McClain Excavating, (hereinafter the "Respondent") is the owner/developer of Cumby Place Subdivision, a residential subdivision located adjacent to Cumby Road in Putnam County (hereinafter the "site"). Service of process may be made on the Respondent at 1721 Gainesboro Grade, Cookeville, Tennessee 38501.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred,

or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

VI.

The unnamed tributary to Rector Branch, described herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses.

Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

VII.

On May 16, 2007, a NOI, SWPPP, and appropriate fee were submitted to the Cookeville Environmental Field Office (CK-EFO) by the Respondent, requesting coverage under the TNCGP for construction activities at the site. The division issued coverage under the TNCGP on May 21, 2007, and assigned tracking number TNR171151.

VIII.

On January 16, 2008, division personnel conducted a site inspection and noted that large areas of the site were bare and unstable. The Erosion Prevention and Sediment Control (EPSC) measures had not been installed in accordance with the SWPPP, were in need of maintenance, and were inadequate in retaining sediment on site. Division personnel noted that eroded material had migrated off site and into an unnamed tributary to Rector Branch, forming deposits several inches deep. The NOC and SWPPP were not available on site as required by the TNCGP.

IX.

On January 18, 2008, the division issued a Notice of Violation (NOV) to the Respondent for the violations noted during the January 16, 2008, site inspection. The Respondent was instructed to submit a response to the division by February 1, 2008, detailing the methods to be used to stabilize the site.

X.

On February 6, 2008, the division received a complaint, which stated that sediment loss from the site was affecting an unnamed tributary to Rector Branch flowing through an adjacent property.

XI.

On February 8, 2008, division personnel conducted a complaint investigation and noted little change in the site conditions since the January 16, 2008, site inspection. Division personnel noted continuing sediment loss into the unnamed tributary to Rector Branch and noted sediment accumulations several inches deep. The NOC and SWPPP were not available on site as required by the TNCGP.

XII.

On February 20, 2008, the division issued a NOV to the Respondent for the violations noted during the February 8, 2008, complaint investigation. The Respondent was instructed to submit a response to the division by February 29, 2008, detailing the methods to be used to stabilize the site.

VIOLATIONS

XIII.

By failing to comply with the terms and conditions of the TNCGP, the Respondent has violated T.C.A. §§ 69-3-108(b) and 114(b), which state in part:

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XIV.

By causing a condition of pollution in the unnamed tributary to Rector Branch, the Respondent has violated T.C.A. Section § 69-3-114(a), which states:

T.C.A. § 69-3-114(a):

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following Order and Assessment to the Respondent.

1. The Respondent shall, within 7 days of receipt of this Order and Assessment, establish effective EPSC measures such that sediment is not allowed to leave the site or enter waters of the state. These measures shall be chosen and installed in accordance with the Tennessee Erosion and Sediment Control Handbook.
2. The Respondent shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondent shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the CK-EFO at 1221 South Willow Avenue, Cookeville, Tennessee 38506, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
3. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
4. The Respondent shall, within 30 days of receipt of this Order and Assessment, submit an application and supporting documents requesting written authorization under a General ARAP for Sediment Removal for Stream Remediation. These documents shall be

submitted to the Water Pollution Control Manager in the CK-EFO at the address shown above in Item 2.

5. The Respondent shall, within 60 days of receiving written authorization from the division, complete the activities approved under the General ARAP for Sediment Removal for Stream Remediation and submit notification of the completion of these activities to the Water Pollution Control Manager in the CK-EFO at the address shown above in Item 2.
6. The Respondent shall pay a CIVIL PENALTY of TWENTY SIX THOUSAND DOLLARS (\$26,000.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondent shall, within 30 days of entry of this Order and Assessment, pay a CIVIL PENALTY in the amount of SIX THOUSAND DOLLARS (\$6,000.00).
 - b. If the Respondent fails to comply with Part XV, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
 - c. If the Respondent fails to comply with Part XV, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
 - d. If the Respondent fails to comply with Part XV item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
 - e. If the Respondent fails to comply with Part XV, item 4 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.

- f. If the Respondent fails to comply with Part XV, item 5 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 4th day of March 2008.



Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.